

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.681/2018**

% **21st August, 2018**

ARCHANA CHOPRA Appellant

Through: Mr. Deepak Sharma, Advocate
with Mr. Ashish Sharma,
Advocate and Mr. Kunal
Vashist, Advocate (M.
No.9911794319).

versus

SHASHI ROY AND ORS. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.33561/2018(exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.33562/2018 (for condonation of delay)

2. For the reasons stated in the application, delay of 99 days
in re-filing the appeal is condoned.

C.M. stands disposed of.

RFA No.681/2018 and C.M. No.33560/2018 (stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 14.12.2017 by which trial court has dismissed the suit for injunction filed by the appellant/plaintiff with respect to first floor of the property bearing no. C-76, Panchsheel Enclave, New Delhi-17(Hereinafter the "suit property"). In essence, the first floor is nothing but basically a dilapidated small room on the first floor of the subject property and without the conveniences of a kitchen or a bathroom. Admittedly the appellant/plaintiff is not living in the suit property.

4. The prayer clauses of the plaint in the suit for injunctions filled by the appellant/plaintiff read as under:-

“It is, therefore, most respectfully prayed that this Hon’ble Court be pleased to pass a decree in favour of the plaintiff and against the defendants No.1,2 and 5 restraining the said defendants from interfering with the ownership and possession of the plaintiff in respect of the first floor property bearing Municipal No.C-76, Panchsheel Enclave, New Delhi-110017; the said defendants be further restrained from entering upon the common passage from where the staircase leads upto the first floor or from putting their lock at the door marked at position ‘A’ in the site plan annexed as ANNEXURE ‘A’ to the present suit; defendants No.1,2 and 5 be further restrained from interfering with the right of the plaintiff to go upto the first floor of property bearing No.C-76, Panchsheel Enclave, New Delhi, the defendants No.1, 2 and 5 be further restrained from demolishing or causing structural alterations in the existing ground floor of the said premises.

Such other and further relief that this Hon'ble Court deems fit and proper in the facts and circumstances of the case may also be passed in favour of the plaintiff and against the defendants.”

5. The case set up in the plaint by the appellant/plaintiff was that the suit property was owned by the sister of the appellant/plaintiff namely Smt. Indu Gulati. Smt. Indu Gulati has expired as a spinster on 9.5.1994. The appellant/plaintiff pleads that she executed her Will dated 12.1.1994 whereby the first floor of the suit property was bequeathed in her favour. The appellant/plaintiff also claimed to be in possession of the suit property being the first floor of the Panchsheel Enclave property from March, 1994, and therefore being in possession, accordingly the subject suit seeking the relief of injunction was filed.

6. The original defendant no.1 in the suit was the mother of the parties Smt. Kaushalya Gulati and who expired during the pendency of the suit, and the mother Smt. Kaushalya Gulati was substituted by her daughter Smt. Shashi Roy and who is also the sister of the appellant/plaintiff, and Smt. Sashi Roy was already the existing defendant no.2 in the suit .The case set up in the written statement of the defendant nos.1 and 2 was denial of existence of any Will dated

12.1.1994 and that such a will was never executed by Smt. Indu Gulati in favour of the appellant/plaintiff. The Will was pleaded to be a forged and fabricated document. The defendant nos.1 and 2 also pleaded that the appellant/plaintiff was not in possession of the suit property and therefore was not entitled to the relief of injunction to protect her possession as was prayed. In the written-statement it was also pleaded the subject property was acquired by Late Smt. Indu Gulati from the funds provided by her father and mother/defendant no.1 . It is unnatural that as per the Will propounded by the appellant/plaintiff, the daughter made no provision for her widowed mother/defendant no.1. The defendant no.2 was also a widow and it is only the defendant no.2 who took care of Smt . Indu Gulati in her last years of sickness and defendant no.2 also met the financial needs of Smt . Indu Gulati for her treatment. Appellant/Plaintiff was pleaded to have withdrawn all monies from the bank account of Smt. Indu Gulati after her death. suit was hence prayed to be dismissed.

7(i). The first issue requiring examination by this Court is as to whether the appellant/plaintiff was ever in possession of the suit property, because if appellant/plaintiff was not in possession of the

suit property then the reliefs of injunction predicated on appellant/plaintiff being in possession, cannot be decreed in favour appellant/plaintiff. In this regard, counsel for the appellant/plaintiff argues that trial court has incorrectly held that appellant/plaintiff has not pleaded that the appellant/plaintiff was in possession of the suit property and for which purpose reference is invited to para 10 of the plaint wherein the appellant/plaintiff has pleaded herself to be in possession of the suit property since March, 1994.

(ii). However, on a query put by this Court to the counsel for the appellant/plaintiff as to what is the credible evidence, including documentary evidence, led by the appellant/plaintiff with respect to her claim of possession of the suit property (being one dilapidated room on the first floor of the Panchsheel Enclave property), the counsel for the appellant/plaintiff concedes that no documentary evidence whatsoever was filed to show that the appellant/plaintiff was in possession of the suit property being one room on the first floor of the Panchsheel Enclave property. The appellant/plaintiff therefore only relies upon self serving statements made by her in her deposition of being in possession of the suit property.

(iii). I completely agree with the reasoning and conclusion of the trial court that the appellant/plaintiff cannot be held to be in possession of the suit property being one room on the first floor of the Panchsheel Enclave property because admittedly the appellant/plaintiff is not living in this room but is living in a separate property at D-38, Panchsheel Enclave, New Delhi. Also the issue of any residence of the appellant/plaintiff in the one room on the suit property does not arise because the said room is a dilapidated room without any conveniences of a kitchen and a bathroom. Trial court has in this regard rightly has relied upon the Local Commissioner's Report dated 17.2.1996 which showed that keys of the staircase for reaching to the first floor was provided by the defendant no.2/sister of the appellant/plaintiff. Therefore in my opinion trial court has committed no illegality by holding that the appellant/plaintiff was not in possession of the suit property on the first floor and hence was not entitled to the relief of injunctions on the basis that the appellant/plaintiff was in possession of the suit property. Some of the relevant paras of the judgment of the trial court, and with which

discussion and reasoning I agree, are paras 12(a) to 12(f) and 17 and 17(a), and these paras read as under:-

“12(a) The plaintiff has instituted the present suit as an owner of first floor portion of the suit property by virtue of Will dated 12/01/1994 of Ms. Indu Gulati, vide which she has been bequeathed the first floor of the suit property. As observed in decision upon issue no. 1, the factum of execution of said Will remained unproved. Thus, the plaintiff cannot be considered as owner of first floor portion of the suit property. Regarding the possession over first floor of the suit property, the plaintiff merely alleged that she was in possession of the same but did not offer any proof - documentary or otherwise to substantiate it.

12(b) As per plaint, the suit property is partially built on the first floor, access to which is through the existing staircase leading from the passage on the ground floor at the side. The plaint mentions that the first floor was under her lock and key but did not mention the date on which she put her lock on the entrance to the first floor. The plaintiff admitted in cross examination that she never complained to police when her lock was removed by defendants no. 1 and 2 and they put their lock there. As per plaint, the plaintiff used first floor room of the suit property as a store room due to paucity of space in her own home at D-38, Panchsheel Enclave but did not mention what exact household items were kept there. The plaintiff admittedly never resided on the first floor of the suit property. The plaint mentions that defendants no. 1, 2 and 5 obstructed her entry to the first floor by putting locks on the entry gate but she never called police, as observed above.

12(c) On the other hand, defendants no. 1 and 2 always took the stand that plaintiff had nothing to do with the suit property; she was never in possession of the single inch of the premises, therefore, there was no question of obstructing her entry to first floor. They denied that plaintiff had right to go to first floor.

12(d) In order to substantiate her assertion of possession over first floor of the suit property, plaintiff led no specific evidence except her own bald testimony. Rather, she admitted in cross examination dated 02/08/2005 that she was not resident of the suit premises for last 14 years i.e. w.e.f. the year 1991. In view thereof, the plaintiff should have led the evidence about the specific date on which she came in possession of the first floor of the suit property.

12(e) The Local Commissioner in his report dated 17/02/1996 mentioned that the keys to the first floor was provided to him by defendant no. 2. The

staircase leading to the first floor was having asbestos sheet roof. On the first floor, there was a small room with cemented roof measuring about 5 ft. 4 inches x 10 ft. There was a room with asbestos sheet in one corner of the roof. Adjoining to the said covered portion there was a toilet with asbestos sheet roof. The rest of the terrace was found open and nothing was constructed thereupon. The Local Commissioner did not find any material belongings on the first floor. The photographs of the first floor, filed by the Local Commissioner do not show any material belongings kept in the room. The first floor do not seem habitable in the photographs.

12(f) By way of clever drafting, the plaintiff merely mentioned in
plaint that she was an owner in possession of first floor of the suit property
but did not mention the date or period since when she was in possession of
the same. In her affidavit of evidence also, the plaintiff did not clarify the
date when she came in possession of first floor of the suit property.
Plaintiff did not examine any witness in support of her assertion that she
was in possession of first floor of the suit property. It is
apparent that the entire claim of plaintiff regarding ownership and
possession over the first floor of the suit property hinged upon the Will
dated 12/01/1994, which remained unproved. Thus, the assertion of the
plaintiff regarding possession over first floor of the suit property also
remained unproved. Issue no. 2 is decided against the plaintiff
and in favour of defendants

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17. **Issue No.(vii):** Whether plaintiff is entitled to the grant of injunction as prayed for in the plaint?

17(a) The plaintiff has prayed for permanent injunction on the basis of ownership and possession over the first floor of the suit property. In order to obtain relief, it was incumbent upon the plaintiff to at least prove her pre-existing possession over the first floor of suit property. As observed in decision upon issue no.2, the plaintiff failed to prove her ownership as well as possession over the first floor of suit property at the time of institution of the suit. Hence, plaintiff is not entitled to the relief of permanent injunction, as prayed for in the plaint. Issue no.7 is decided against the plaintiff and in favour of the defendants.”

(underlining added)

8(i) The second issue to be examined by this Court is as to whether the appellant/plaintiff has proved that in her favour a Will dated 12.1.1994 has been executed by Smt. Indu Gulati. A Will is

proved as per Section 68 of the Indian Evidence Act, 1872 by calling at least one attesting witness. Admittedly no attesting witness to the Will has been examined on behalf of the appellant/plaintiff and counsel for the appellant/plaintiff admits that it is not the case of the appellant/plaintiff that both the attesting witnesses are dead or are not available for giving evidence.

(ii) Even for the sake of arguments if the attesting witnesses were dead or could not be found, then a Will is proved in terms of Section 70 of the Indian Evidence Act whereby it has to be proved that signatures of the attesting witness are in handwriting of the attesting witness and that the executant of the Will execute the Will as per his signatures which are duly proved. Sections 68 and 70 of the Indian Evidence Act read as under:-

“Section 68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

70. Admission of execution by party to attested document. — The admission of a party to an attested document of its execution by himself

shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.”

iii). In the affidavit by way of evidence filed on behalf of the appellant/plaintiff all that is deposed for proving of the Will dated 12.1.1994 is para 12, and this para 12 reads as under:-

“12. I say that the Will dated 12.01.1994 has been duly attested by two witnesses, being Mrs. Sheela Uberoi, R/o D-53, Panchsheel Enclave, New Delhi and Mrs. Harbhajan Kaur R/o C-75, Panchsheel Enclave, New Delhi. It may be stated here that Mrs. Sheela Uberoi is an old friend of the deceased and so is Mrs. Harbhajan Kaur who also happens to be the immediate neighbour residing at C-75 Panchsheel Enclave, New Delhi. I say that will has been executed by Late Miss Indu Gulati. I can identify the signatures of Miss Indu Gulati, as I have seen her signing and writing. The Will is exhibit is Exhibit P-1/D-3.”

(iv) In my opinion it has to be held that the appellant/plaintiff has miserably failed to prove the Will relied upon by her for claiming any title to the suit property as the requirements of Section 68 and 70 of Indian Evidence Act are not complied with.

9. Learned counsel for the appellant/plaintiff sought to argue by placing reliance upon a document being para 5 of an affidavit filed by the defendant no.2 in the rejoinder affidavit in a Transfer Petition filed in the Supreme Court titled as ***Shri Sugato Roy and Another Vs. Mr. Ashok Midha***, however, I do not find anything in this para 5 of the rejoinder affidavit which in categorical terms admits

the validity and existence of the alleged Will dated 12.1.1994 by the respondent no.1/defendant no.2.

10. There is no merit in the appeal. Dismissed.

AUGUST 21, 2018

VALMIKI J. MEHTA, J

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